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BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

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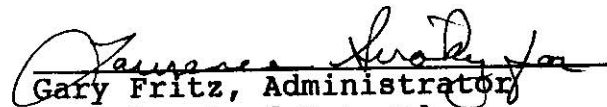
IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) NOTICE OF ERRATUM
NO. 67217-43B BY ROBERT H. BURNS)

* * * * *

The Final Order in the above specified matter dated September 15, 1989, contained a typographical error and should be changed to read as follows:

Page 2, line 9, reads S½SW¼, and should read S½SE¼.

Dated this 13 day of October, 1989.


Gary Fritz, Administrator
Department of Natural
Resources and Conservation
Water Resources Division
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6605

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Notice of Erratum was duly served upon all parties of record at their address or addresses this 13th day of October, 1989, as follows:

Robert H. Burns
P.O. Box 697
Big Timber, MT 59011

Swamp Creek Angus Ranch
P.O. Box 637
Big Timber, MT 59011

James Morrow
Attorney at Law
P. O. Box 1168
Bozeman, MT 59715

Keith Kerbel
Field Manager
1537 Avenue D, Suit 105
Billings, MT 59102

CASE # 67217

Josephson & Fredricks
115 West 2nd Avenue
P.O. Box 1047
Big Timber, MT 59011-1047



Irene V. LaBare
Legal Secretary

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BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)	
FOR BENEFICIAL WATER USE PERMIT)	FINAL ORDER
NO. 67217-43B BY ROBERT H. BURNS)	

* * * * *

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter has expired. No timely written exceptions were received. Therefore, having given the matter full consideration, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the August 4, 1989 Proposal for Decision, and incorporates them herein by reference.

WHEREFORE, based upon the record herein, the Department makes the following:

ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Application for Beneficial Water Use Permit No. 67217-43B is hereby granted to Robert H. Burns to appropriate 12.5 cubic feet per second up to 498.7 acre-feet of water per year for irrigation purposes.

The water will be diverted from the South Fork of Swamp Creek by means of a headgate at a point in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 35, Township 3 North, Range 12 East. The water will flow by means of a ditch to an unnamed tributary of Swamp Creek where it

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will flow into Swamp Creek and be diverted by existing diversions for supplemental irrigation on 24 acres in the N $\frac{1}{2}$ SE $\frac{1}{4}$, seven acres in the N $\frac{1}{2}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$, three acres in the S $\frac{1}{2}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 35; eight acres in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$, eight acres in the S $\frac{1}{2}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$, 45 acres in the SW $\frac{1}{4}$, 100 acres in the SE $\frac{1}{4}$ of Section 36, all in Township 3 North, Range 12 East; and 130 acres in the N $\frac{1}{2}$ and 35 acres in the N $\frac{1}{2}$ SE $\frac{1}{4}$ of Section 6, Township 2 North, Range 13 East. A lateral ditch will divert water from the new main ditch for new irrigation on 38 acres in the S $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 35, Township 3 North, Range 12 East, all in Sweet Grass County, Montana.

The period of use shall be April 15 through October 15, inclusive of each year. The priority date for this Permit is April 13, 1988 at 1:08 p.m.

This Permit is issued subject to the following express terms, conditions, restrictions, and limitations:

A. This permit is issued subject to all prior and existing rights, and to any final determination of such rights as provided by Montana law. Nothing herein shall be construed to authorize appropriations by the Permittee to the detriment of any senior appropriator.

B. Issuance of this Permit by the Department shall not reduce the Permittee's liability for damages caused by exercise of the Permit, nor does the Department, in issuing this Permit, acknowledge any liability for damages caused by exercise of this Permit, even if such damage is a necessary and unavoidable consequence of the same.

C. This Permit is subject to the condition that the Permittee shall install an adequate flow measuring device at the end of the ditch which conveys water from the South Fork of Swamp Creek. The measuring device shall be located just above the confluence of said ditch and unnamed tributary of Swamp Creek. The Permittee shall keep a written record of the flow rate and volume, including the time, of those nondecreed waters as they flow into the aforementioned tributary. Further, the Permittee shall keep records of the nondecreed water diverted from Swamp Creek for supplemental irrigation. Those records shall be submitted to the Billings Water Rights Field Office of the Department of Natural Resources and Conservation upon demand but no less than once a year at the end of the irrigation season. The Billings Field Office will notify the Permittee of the date these records will be due.

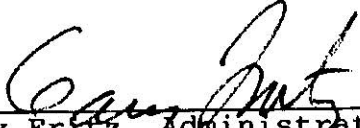
D. The waters diverted from the South Fork of Swamp Creek into the unnamed tributary of Swamp Creek are subject to the authority of the court appointed water commissioner to admeasure and distribute to the parties using water in Swamp Creek to which they are entitled. Robert Burns, and any successor in interest, shall pay his proportionate share of the fees and compensation and expenses, as fixed by the District Court, incurred in the distribution of the waters affected by the issuance of this provisional Permit.

E. If at any time after this Permit is issued, a written complaint is received by the Department alleging that diverting from this source is adversely affecting a prior water right, the Department may make a field investigation of the project. If during the field investigation, the Department finds sufficient evidence supporting the allegation, it may conduct a hearing in the matter allowing the Permittee to show cause why the Permit should not be modified or revoked. The Department may then modify or revoke the permit to protect existing rights or allow the permit to continue unchanged if the Hearing Examiner determines that no existing water rights are being adversely affected.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of the Final Order.

Dated this 15 day of September, 1989.



Gary Fritz, Administrator
Department of Natural
Resources and Conservation
Water Resources Division
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6605

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record at their address or addresses this 15th day of September, 1989, as follows:

Robert H. Burns
P.O. Box 697
Big Timber, MT 59011

Swamp Creek Angus Ranch
P.O. Box 637
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Josephson & Fredricks
115 West 2nd Avenue
P.O. Box 1047
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James Morrow
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Field Manager
1537 Avenue D, Suit 105
Billings, MT 59102


Irene V. LaBare
Legal Secretary

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BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) PROPOSAL FOR DECISION
NO. 67217-43B BY ROBERT H. BURNS)

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a contested case hearing in the above-entitled matter was held on March 28, 1989 in the Courtroom of the Sweet Grass County Courthouse in Big Timber, Montana.

Robert H. Burns, Applicant, appeared at the hearing in this matter and by and through legal counsel, James H. Morrow.

Horatio W. Burns appeared as a witness for the Applicant.

Swamp Creek Angus Ranch, Objector, appeared at the hearing by and through legal counsel, Richard W. Josephson.

Arne Grosfield and Mrs. Grosfield appeared as witnesses for the Objector.

Don Riddle, New Appropriations Specialist in the Billings Water Rights Bureau Field Office, appeared as staff witness for the Department of Natural Resources and Conservation (hereafter, the Department or DNRC).

PRELIMINARY MATTERS

The taped record of this hearing is of very poor quality. All parties to the hearing agreed to the Proposal for Decision being written from the Hearing Examiner's memory and notes,

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Objector's and Applicant's exhibits, and those portions of the tape that are clear and distinct.

EXHIBITS

The Department file was made available at the hearing for review by all parties. No party made objection to any part of the file. Therefore, the Department file in this matter is included in the record in its entirety.

The Applicant offered three exhibits for inclusion in the record in this matter:

Applicant's Exhibit 1 is a photocopy of a one-page letter from District Court Judge Byron L. Robb to the Applicant and Horatio W. Burns concerning the status of the South Fork of Swamp Creek in the Big Timber decree. Objector objected to the inclusion of this exhibit in the record on the basis it was irrelevant to the case. The submission of the exhibit for the record and the objection thereto are not well taken. A copy of this letter is in the Department file which was accepted as part of the record without objection. The Hearing Examiner allowed the testimony concerning the letter because she had some questions about Dry Creek which was discussed in the letter.

Applicant's Exhibit 2 is a USGS Quadrangle map, Raspberry Butte, Montana, which has been enhanced to show the boundary of Applicant's property and the location of both the Applicant's and Objector's ditches, headgates, points of diversion, and places of use. This exhibit was accepted for the record with no objection.

Applicant's Exhibit 3 is a photograph showing two culverts in the road across the South Fork of Swamp Creek. This exhibit was accepted for the record with no objection.

Objector offered four exhibits for inclusion in the record in this matter:

Objector's Exhibit 1 consists of photocopies of 10 pages of the Sweet Grass County Water Resource Survey. The first page of the exhibit is the title page of said publication and the other nine pages are a condensation of the Bailey v. Tintinger decree. Applicant objected on the basis it was irrelevant. A decision on the objection was reserved. The Hearing Examiner has reviewed the exhibit and finds it relevant to provide evidence that both Applicant and Objector have decreed water rights in Swamp Creek. Objection overruled.

Objector's Exhibit 2 is a certified copy of Big Timber Creek Canal Company v. Anderson decree consisting of 19 pages. Applicant objected on the basis it was irrelevant. A decision on the objection was reserved. The Hearing Examiner has reviewed the exhibit and finds it relevant to provide evidence of a second decree determining the rights of surplus waters of Big Timber Creek and its tributaries not decreed in the original Big Timber decree. This exhibit establishes that Applicant and Objector have further decreed rights in Swamp Creek. Objection overruled.

Objector's Exhibit 3 consists of certified copies of five Petitions for Appointment of Water Commissioner to measure and distribute the waters under the Big Timber decrees for the years

of 1984 through 1988. Applicant objected on the basis it was irrelevant to the case. A decision on the objection was reserved. The Hearing Examiner has reviewed the exhibit and finds it relevant to establish there is a need for a water commissioner in the Big Timber Creek Basin, including Swamp Creek, some years and gives a general indication of the time of the year the high water period is over. Objection overruled.

Objector's Exhibit 4 is a photocopy of the title page of Handbook of Water Control and a photocopy of one page of Section A, which includes text on equivalents of water measurement, specifically, one cubic foot per second (hereafter cfs) of water equals 1.983 acre-feet of water per day (24 hours). A decision on the objection was reserved. The Hearing Examiner has reviewed the exhibit and finds it irrelevant. Objector intended to use the exhibit to show the amount of water that could be moved at a rate of 12.5 cfs and that the Applicant could not possibly use that amount of water continuously. It is common knowledge that one does not flood irrigate continuously. Objection sustained. The statements made and questions asked by Objector's counsel concerning this exhibit and the response made by Applicant will be assigned no weight.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following proposed Findings of Fact, Conclusions of Law, and Order.

PROPOSED FINDINGS OF FACT

1. Section 85-2-302, MCA, states, in relevant part, "[E]xcept as otherwise provided in (1) through (3) of 85-2-306, a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or distribution works therefor except by applying for and receiving a permit from the department". The exceptions to permit requirements listed in § 85-2-306, MCA, do not apply in the present matter.

2. Application for Beneficial Water Use Permit No. 67217-43B (hereafter Application) was duly filed with the Department of Natural Resources and Conservation on April 13, 1988 at 1:08 p.m.

3. The pertinent portions of the Application were published in The Big Timber Pioneer, a newspaper of general circulation in the area of the source, on June 8, 1988.

4. The source for the Applicant's proposed appropriation is surface water from the South Fork of Swamp Creek, a tributary of Swamp Creek. (Swamp Creek was also referred to as the North Fork of Swamp Creek during this hearing.) The South Fork of Swamp Creek is also known as Dry Creek or Rock Creek and was referred to as simply "South Fork" throughout this hearing. Except during periods of high runoff, the South Fork of Swamp Creek water disappears into a geologic fault at a point in the SE¼SE¼SW¼ of Section 35, Township 3 North, Range 12 East, below Applicant's proposed point of diversion. Up to that point, the

stream is perennial. (Applicant's Exhibit 2, Department file, testimony of Applicant and Horatio Burns.)

5. There are no records to indicate that studies have been performed on the South Fork of Swamp Creek by an expert in the field of geology or hydrology to determine where the water eventually goes after it flows into the fault. None of the witnesses professed to know what happens to that water. (Testimony of Applicant, Horatio Burns, Don Riddle, and Arne Grosfield.)

6. Swamp Creek is a tributary of Big Timber Creek, an adjudicated stream, by an action in District Court in Sweet Grass County, Montana, as Cause No. 483, Bailey v. Tintinger. A decree was entered on April 1, 1911. That decree was modified and remanded to District Court by the Montana Supreme Court on March 11, 1912. The case was reheard and the decree was amended August 10, 1915, by the District Court. Thereafter, three supplementary proceedings were held and entered in the District Court, the last being entered December 19, 1917. On August 18, 1966, the Big Timber Canal Users filed a petition for additional surplus waters. A trial was held March 30, 1970, and a decree was entered June 1, 1970, subject to the terms and provisions for the use of the waters of Big Timber Creek and its tributaries as decreed by the Court in Bailey v. Tintinger. (Objector's Exhibits 2 and 3.)

7. The South Fork of Swamp Creek is not subject to the Big Timber Creek decrees. Paragraph IV on page 5 of the Findings of Fact in Cause No. 483, Bailey v. Tintinger, states that Dry Creek

(the South Fork of Swamp Creek) is a geographical tributary of Swamp Creek but the waters do not reach Swamp Creek and the use of them "can in no wise prejudice the rights of prior appropriators from Swamp Creek". (District Judge Byron L. Robb's letter to Applicant and Horatio W. Burns in Department file.)

8. Applicant seeks to appropriate water from the South Fork of Swamp Creek at a point in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 35, Township 3 North, Range 12 East. The water is to be diverted at a rate of 12.5 cfs up to 498.7 acre-feet for new irrigation on 38 acres and supplemental irrigation on 360 acres between April 15 and October 15, inclusive, of each year. The proposed place of use for the new irrigation is 38 acres in the S $\frac{1}{2}$ SE $\frac{1}{4}$ of Section 35, Township 3 North, Range 12 East. The proposed places of use for the supplemental irrigation are 24 acres in the N $\frac{1}{2}$ SE $\frac{1}{4}$, seven acres in the N $\frac{1}{2}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$, three acres in the S $\frac{1}{2}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 35; eight acres in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$, eight acres in the S $\frac{1}{2}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$, 45 acres in the SW $\frac{1}{4}$, 100 acres in the SE $\frac{1}{4}$ of Section 36, all in Township 3 North, Range 12 East; and 130 acres in the N $\frac{1}{2}$ and 35 acres in the N $\frac{1}{2}$ SE $\frac{1}{4}$ of Section 6, Township 2 North, Range 13 East, all in Sweet Grass County.

9. The proposed means of diversion is a 30 inch culvert with a steel gate on it that diverts water directly out of the South Fork of Swamp Creek into a ditch which will carry the water in an easterly direction then in a northwesterly direction to a perennial unnamed tributary of Swamp Creek at a point in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 35, Township 3 North, Range 12 East. From

that point, the waters will mingle and flow into Swamp Creek, a perennial stream, where they will be diverted by means of existing diversions for supplemental irrigation. The proposed means of diversion for the new irrigation is a ditch from the main ditch which carries the water in a southeasterly direction to the new irrigation. The new diversion works and ditch for which this Application has been made were completed in 1985 and have been used since that time. (Department file, testimony of Don Riddle, Applicant, Horatio Burns and Bertha Grosfield.)

10. The South Fork of Swamp Creek has a tremendous flow rate during high runoff periods then tapers down to a lesser flow depending on the snow melt in the mountains and the amount of precipitation received in the area. A flow rate of 12.5 cfs is not available after the runoff period. However, there was a fairly constant flow of seven-tenths of a foot of height through Applicant's Parshall flume a large part of the irrigation seasons of 1987 and 1988. The Parshall flume is located in the Applicant's ditch in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 35, Township 3 North, Range 12 East. (Applicant's Exhibit No. 2, testimony of Applicant, Arne Grosfield, and Horatio Burns.)

11. There are no other water rights of record on the South Fork of Swamp Creek below the Applicant's proposed point of diversion. (Department records.)

12. The Objector has filed two Statements of Claim Nos. W027168-43B and W027169-43B, before the Water Courts of Montana claiming a priority date of September 5, 1903 for each, to

appropriate water between April 1 and October 4, inclusive, each year from the South Fork of Swamp Creek for irrigation purposes. The point of diversion for both Claims is SE $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 34, Township 3 North, Range 12 East, approximately a quarter of a mile upstream from Applicant's proposed point of diversion. The means of diversion for these claimed rights is a headgate and ditch which carries the water to places of use in Township 2 North, Ranges 12 and 13 East.

Statement of Claim No. W027168-43B claims water is appropriated at a rate of 3.63 cfs up to 1,305 acre-feet per year to irrigate 252.40 acres. Statement of Claim No. W027169-43B claims water is appropriated at a rate of 3.5 cfs up to 1,260 acre-feet per year. Claim Nos. W027168-43B and W027169-43B are supplemental to Claim Nos. W027167-43B and W027170-43B which means the rights have overlapping places of use. The rights can be combined to irrigate only overlapping parcels of the claimant's total 252.4 acres. (Department file and Applicant's Exhibit 2.)

13. Objector, Swamp Creek Angus Ranch, has a decreed right with a priority date of April 21, 1890, to appropriate water from Swamp Creek and has filed a Statement of Claim before the Water Courts of Montana claiming one cfs up to 360 acre-feet per year of water for irrigation purposes on 58.2 acres from April 1 to October 4, inclusive, of each year. The point of diversion claimed is the SW $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 5, Township 2 North, Range 13 East. (Department file, Objector's Exhibits 2 and 3.)

14. In most years there is need for a court appointed water commissioner who has the authority to measure and distribute the waters of Swamp Creek. (Objector's Exhibit 3 and testimony of Arne Grosfield.)

15. Department records do not disclose other planned uses or developments for which a permit has been issued or for which water has been reserved.

Based upon the foregoing Findings of Fact and upon the record in this matter, the Hearing Examiner makes the following:

PROPOSED CONCLUSIONS OF LAW

1. The Department gave proper notice of the hearing, and all relevant substantive and procedural requirements of law or rule have been fulfilled, therefore the matter was properly before the Hearing Examiner.

2. The Department has jurisdiction over the subject matter herein and the parties hereto.

3. The Department must issue a Beneficial Water Use Permit if the Applicant proves by substantial credible evidence that the following criteria are met.

- (a) there are unappropriated waters in the source of supply:
 - (i) at times when the water can be put to the use proposed by the applicant;
 - (ii) in the amount the applicant seeks to appropriate; and
 - (iii) throughout the period during which the applicant seeks to appropriate, the amount requested is available;
- (b) the water rights of a prior appropriator will not be adversely affected;
- (c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

(d) the proposed use of water is a beneficial use;

(e) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved;

Section 85-2-311, MCA.

4. The proposed use of water, irrigation, is a beneficial use of water. See § 85-2-102(2), MCA.

5. The proposed means of diversion, construction, and operation of appropriation works are adequate. See Finding of Fact 9.

6. The proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved. See Finding of Fact 15.

7. There are unappropriated waters in the source of supply at times when the water can be put to the use proposed by the Applicant, and in the volume the Applicant seeks to appropriate. There are no other water rights of record on the South Fork of Swamp Creek. (Finding of Fact 11.) Both Arne Grosfield and Horatio Burns testified that the South Fork of Swamp Creek has a tremendous flow during high runoff periods. Horatio Burns testified that after the runoff period, late in the year, a fairly constant flow of seven-tenths of a foot of water flowed through the two-foot throat of the Parshall flume located in the Applicant's ditch. According to the information available to the Examiner, this is about 4.6 cfs. While the flow rate of 12.5 cfs is not available all the time, it is available part of the time

and after that, water is available at a lesser rate for irrigation use. It is possible to appropriate the volume of water proposed in the Application with a flow rate of either 12.5 cfs or 4.6 cfs or a combination of both. See Findings of Facts 8, 10, and 11.

8. The Applicant has provided substantial credible evidence that the water rights of prior appropriators will not be adversely affected. Applicant's point of diversion is downstream from Objector's point of diversion on the South Fork of Swamp Creek and cannot have an adverse effect on those water rights. There are no other users of the waters from the South Fork of Swamp Creek.

Objector does have a decreed water right on Swamp Creek which is downstream; however, after spring runoff, it is unlikely that the waters of the South Fork of Swamp Creek ever get to Swamp Creek. The Applicant, Horatio Burns, and Don Riddle stated they did not know where the water goes after it disappears into the fault, as did counsel for the Objector. As it now appears, there are waters that flow into the fault if they are not diverted by the Applicant. No one seems to know where those waters go. But, in Bailey v. Tintinger, the Court held that, although the South Fork of Swamp Creek is a geographical tributary of Swamp Creek, the waters do not reach Swamp Creek and cannot "prejudice" the rights of prior appropriators from Swamp Creek.

Applicant testified he thinks this appropriation will actually benefit other appropriators by adding water to Swamp Creek. He estimates 80% of the water diverted from the South Fork of Swamp Creek to Swamp Creek will be available as return flow from his irrigation instead of letting it run into the fault. See Findings of Fact 4, 5, and 7.

From the foregoing, the Examiner concludes there will be no adverse effect to any appropriator either in the South Fork of Swamp Creek or Swamp Creek.

9. There was much mention of the fact that this project was completed without a Permit. This is contrary to the Water Use Act and the Examiner does not condone such actions. However, that was not the issue at this hearing. This hearing was held solely to determine if the Applicant could prove by substantial credible evidence the criteria for issuance of a Beneficial Water Use Permit as set forth in § 85-2-311(1)(a) through (e) had been met.

10. When there is a water commissioner on a stream, that commissioner has the authority to distribute the water, whether the water right is a decreed water right, permit, or certificate, according to priority. Water diverted from a stream not subject to a decree, to a stream that is subject to a decree, is subject to the measurement and distribution by the water commissioner to ensure the appropriator takes the amount that he diverted into the decreed stream. See Finding of Fact 14 and § 85-5-301, MCA.

WHEREFORE, based upon the foregoing proposed Findings of Fact and Conclusions of Law, and upon the record in this matter, the Hearing Examiner makes the following:

PROPOSED ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Application for Beneficial Water Use Permit No. 67217-43B is hereby granted to Robert H. Burns to appropriate 12.5 cubic feet per second up to 498.7 acre-feet of water per year for irrigation purposes.

The water will be diverted from the South Fork of Swamp Creek by means of a headgate at a point in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 35, Township 3 North, Range 12 East. The water will flow by means of a ditch to an unnamed tributary of Swamp Creek where it will flow into Swamp Creek and be diverted by existing diversions for supplemental irrigation on 24 acres in the N $\frac{1}{2}$ SE $\frac{1}{4}$, seven acres in the N $\frac{1}{2}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$, three acres in the S $\frac{1}{2}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 35; eight acres in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$, eight acres in the S $\frac{1}{2}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$, 45 acres in the SW $\frac{1}{4}$, 100 acres in the SE $\frac{1}{4}$ of Section 36, all in Township 3 North, Range 12 East; and 130 acres in the N $\frac{1}{2}$ and 35 acres in the N $\frac{1}{2}$ SE $\frac{1}{4}$ of Section 6, Township 2 North, Range 13 East. A lateral ditch will divert water from the new main ditch for new irrigation on 38 acres in the S $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 35, Township 3 North, Range 12 East, all in Sweet Grass County, Montana.

The period of use shall be April 15 through October 15, inclusive of each year. The priority date for this Permit is April 13, 1988 at 1:08 p.m.

This Permit is issued subject to the following express terms, conditions, restrictions, and limitations:

A. This permit is issued subject to all prior and existing rights, and to any final determination of such rights as provided by Montana law. Nothing herein shall be construed to authorize appropriations by the Permittee to the detriment of any senior appropriator.

B. Issuance of this Permit by the Department shall not reduce the Permittee's liability for damages caused by exercise of the Permit, nor does the Department, in issuing this Permit, acknowledge any liability for damages caused by exercise of this Permit, even if such damage is a necessary and unavoidable consequence of the same.

C. This Permit is subject to the condition that the Permittee shall install an adequate flow measuring device at the end of the ditch which conveys water from the South Fork of Swamp Creek. The measuring device shall be located just above the confluence of said ditch and unnamed tributary of Swamp Creek. The Permittee shall keep a written record of the flow rate and volume, including the time, of those waters as they flow into the aforementioned tributary. Further, the Permittee shall keep records of the nondecreed water diverted from Swamp Creek for supplemental irrigation. Those records shall be submitted to the Billings Water Rights Field Office of the Department of Natural Resources and Conservation upon demand but no less than once a year at the end of the irrigation season. The Billings Field

Office will notify the Permittee of the date these records will be due.

D. The waters diverted from the South Fork of Swamp Creek into the unnamed tributary of Swamp Creek are subject to the authority of the court appointed water commissioner to admeasure and distribute to the parties using water in Swamp Creek to which they are entitled. Robert Burns, and any successor in interest, shall pay his proportionate share of the fees and compensation and expenses, as fixed by the District Court, incurred in the distribution of the waters affected by the issuance of this provisional Permit.

E. If at any time after this Permit is issued, a written complaint is received by the Department alleging that diverting from this source is adversely affecting a prior water right, the Department may make a field investigation of the project. If during the field investigation, the Department finds sufficient evidence supporting the allegation, it may conduct a hearing in the matter allowing the Permittee to show cause why the Permit should not be modified or revoked. The Department may then modify or revoke the permit to protect existing rights or allow the permit to continue unchanged if the Hearing Examiner determines that no existing water rights are being adversely affected.

NOTICE

This proposal is a recommendation, not a final decision. All parties are urged to review carefully the terms of the proposed order, including the legal land descriptions. Any party

adversely affected by the Proposal for Decision may file exceptions thereto with the Hearing Examiner (P.O. Box 1269, Glasgow, Montana 59230); the exceptions must be filed and served upon all parties within 20 days after the proposal is mailed. Section 2-4-623, MCA. Parties may file responses to any exception filed by another party within 20 days after service of the exception.

Exceptions must specifically set forth the precise portions of the proposed decision to which exception is taken, the reason for the exception, and authorities upon which the exception relies. No final decision shall be made until after the expiration of the time period for filing exceptions, and the due consideration of any exceptions which have been timely filed.

Any adversely affected party has the right to present briefs and oral arguments pertaining to its exceptions before the Water Resources Division Administrator. A request for oral argument must be made in writing and be filed with the Hearing Examiner within 20 days after service of the proposal upon the party. Section 2-4-621(1), MCA. Written requests for an oral argument must specifically set forth the party's exceptions to the proposed decision.

Oral arguments held pursuant to such a request normally will be scheduled for the locale where the contested case hearing in this matter was held. However, the party asking for oral argument may request a different location at the time the exception is filed.

Parties who attend oral argument are not entitled to introduce new evidence, give additional testimony, offer additional exhibits, or introduce new witnesses. Rather, the parties will be limited to discussion of the evidence which already is present in the record. Oral argument will be restricted to those issues which the parties have set forth in their written request for oral argument.

Dated this 4th day of August, 1989.

Irene V. LaBare / for
Vivian Lighthizer, Hearing Examiner
Department of Natural Resources
and Conservation
839 1st Avenue South
P.O. Box 1269
Glasgow, MT 59230
(406) 228-2561

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served upon all parties of record at their address or addresses this 4th day of August, 1989, as follows:

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